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No. 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF CASE	2
ARGUMENT	2
1. The issues raised by Cross-Petitioner are not novel legal issues	2
2. Not only is the opinion of the Appellate Court accurate and correct in respect to the *Orr Ditch* defendants, it is also a fair and just decision for the residents of the Truckee Meadows	3
CONCLUSION	7
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES Page

Bradburn v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947) 5

Clay v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962) 5

Heckman v. *United States*, 224 U.S. 413 (1912) 3

The Minnesota Mining Company v. *The National Mining Company*, 70 U.S. 332 (1866) 6

Teter v. *Irwin*, 71 S.E. 115 (W. Va. 1911) 5

United States v. *Creek Nation*, 295 U.S. 103 (1935) 5

United States v. *Orr Water Ditch Co.*, Equity No. A-3 ..... *passim*

Yankton Sioux Tribe of Indians v. *United States*, 272 U.S. 351 (1926) 5

MISCELLANEOUS

Supreme Court Rule 21.1(k) 1

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RESPONDENTS, City of Reno, City of Sparks and Washoe County, respectfully submit the following brief in opposition to the Pyramid Lake Tribe's Cross-Petition for a Writ of Certiorari.[1]

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[1] Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Respondents City of Reno, Sparks and Washoe County adopt those Appendices for purposes of this Brief in Opposion. Unless otherwise noted, all references in this response will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, p. "A-15".

Supplemental materials that constitute a part of the record in this case to which reference is made in this Brief in Opposition are included in the Appendix to this brief. That Appendix will be cited as "Cities' and County's App.".

STATEMENT OF THE CASE

Respondents City of Reno, City of Sparks and Washoe County accept most of the "Statement of the Case" presented in the Cross-Petition for purposes of this response. However, one material misstatement is the claim that the Court of Appeals found that the Government's representation of the Tribe in *Orr Ditch* was improper and inadequate. Though the Court of Appeals assumed such for analysis purposes, it expressly declined to decide that the representation was improper or inadequate. (pp. A-46-47). It should also be pointed out that Reno and Washoe County are *Orr Ditch* defendants and that Sparks is in privity with *Orr Ditch* defendants.

The Cities of Reno and Sparks are within the Truckee Meadows area of Washoe County, Nevada. Most of the 170,000 citizens of Washoe County live within the Truckee Meadows and rely on *Orr Ditch* decreed water rights.

ARGUMENT

1. The issues raised by Cross-Petitioner are not novel legal issues.

For the reasons well discussed in the opinion of the Court below, Judges Skopil, Tuttle and Schroeder agree that the traditional principles of res judicata apply to the *Orr Ditch* defendants. (pp. A-31-50). With a fact-based question presented, the Cross-Petition seeks to persuade this Court to disregard long-standing res judicata principles. No sweeping legal issues are found in the question presented. Cross-Petitioner seeks avoidance of res judicata because of its claim of special facts, an argument which both courts below have rejected. After review of a comprehensive record, the Court of Appeals upheld the most material "special fact" in the case; namely, that the *Orr Ditch* defendants reasonably relied on the authority of the United States to obtain a conclusive judgment on behalf of the Pyramid Lake Tribe. The Court wrote:

> "The question is whether the *Orr Ditch* defendants were aware of a failure by the government to fulfill its responsibility to adequately represent the Tribe in litigation. The answer to this question determines whether the *Orr Ditch* defendants reasonably relied on the government's representation of the Tribe's interests. The district court found that any impropriety in the government's representation 'was unknown to the defendants in *Orr Ditch*.' Finding no. 31, R. 5602. The plaintiffs do not challenge this finding. We cannot say it is clearly erroneous. *Accordingly, the Orr Ditch defendants are entitled to rely on the final decree.*" (p. A-47) (Emphasis added.)[2]

The justifiable reliance of the *Orr Ditch* defendants is fully supported by *Heckman* v. *United States*, 224 U.S. 413 (1912), which was decided one year before the filing of the *Orr Ditch* complaint.

We are in agreement with the analysis of the Court of Appeals insofar as all of the *Orr Ditch* defendants and subsequent appropriators are afforded res judicata. (pp. A-31-50).

2. Not only is the opinion of the Appellate Court accurate and correct in respect to the Orr Ditch defendants, it is also a fair and just decision for the residents of the Truckee Meadows.

The Truckee Meadows is a water short area. Analysis of the historical water supply available in the Truckee River discloses that on the basis of present uses (without

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[2] The District Court was also upheld in its Finding No. 27 which reads as follows:

> "That the Defendants in *Orr Ditch* and their successors in interest in this case, as well as other persons, firms, corporations, entities, governmental units, agriculture, business, industry and labor have detrimentally relied upon the terms and conditions and the final and conclusive nature of the *Orr Ditch* final decree." (p. A-105).

the attempt to impose a senior right for fishery purposes), insufficient supply has been available to meet Reno-Sparks decreed rights in 12 of 48 years in the period 1927-1974, and in 8 of 39 years in the period 1925-1967. (See Nevada's Brief in the Ninth Circuit, p. 60).

The imposition of the claimed senior fishery water right on the Truckee River would cause severe shortages in the Truckee Meadows. Irrigation uses, necessary for the survival of vegetation in the local desert environment, would be severely cut back. Farmers' crops and alfalfa would die; lawns and trees would be permitted to die; recreation areas and parks would lose their grass and trees. Even drinking water supplies would be shorted. (Transcript Volume 35, pp. 6679-83).

Forty-three trial days were expended in this case, most of which dealt with evidence addressing the "hurt" or "harm" question which would occur if an 1859 right was superimposed over all other *Orr Ditch* decree rights. The government and Cross-Petitioner attempted to show at trial that the fishing right could be superimposed over existing *Orr Ditch* final decree rights and produce no harm, thereby allowing the court, in "balancing the equities", to decline application of the doctrine of res judicata. However, in Finding 32 the trial court found:

> "The plaintiff and the Tribe have failed to sustain their burden of proof by evidence of sufficient quality and credibility to prove that no harm or 'hurt' will be sustained to the vested legal rights of priority water right holders under the *Orr Ditch* final decree if an 1859 right is superimposed over all other *Orr Ditch* decreed rights for certain minimum flow into the Truckee River for spawning and for flow into Pyramid Lake." (p. A-107).

This finding was not overturned by the Court of Appeals.

In addition, as part of consideration of "the equities" the trial judge took judicial notice that:

> ". . . if the defendants were permitted to do so . . . they would severally and collectively produce before this court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and there has been a very steady population growth in said area since 1944." (Cities & County's Appendix A).

The courts below were correct because equitable relief will not be granted as against innocent third persons, like the *Orr Ditch* defendants, who, in good faith, have acted on the faith of a judgment which is later challenged. *Bradburn* v. *McIntosh*, 159 F.2d 925 (10th Cir. 1947). See also *Clay* v. *Sun River Mining Company*, 302 F.2d 599 (10th Cir. 1962). See *Teter* v. *Irwin*, 71 S.E. 115 (W.Va. 1911). In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), this Court upheld a prior seizing of Indian property even though such seizing may have been mistaken, because the land had been open to settlement and possession by innumerable innocent purchasers. The same result was reached in *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

As this Court has ruled in connection with reliance by innocent parties:

> "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change the laws,

> without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgment." *The Minnesota Mining Company* v. *The National Mining Company*, 70 U.S. 332, 334 (1866).

The justifiable reliance on the *Orr Ditch* Decree by the *Orr Ditch* defendants, and others, outweighs the equitable claims made by the Cross-Petition, which, as stated above, also failed for lack of proof.

Virtually the entire civilization of western Nevada, including all of its people and its economy, has grown and developed in reliance on the *Orr Ditch* Final Decree. Lives and properties of tens of thousands of people, rightfully relying on the *Orr Ditch* Final Decree, will be devastated if the *Orr Ditch* Final Decree is not upheld.

CONCLUSION

The Cross-Petition of the Pyramid Lake Paiute Tribe of Indians should be denied and the decisions of the courts below in connection with the *Orr Ditch* defendants and subsequent appropriators should not be disturbed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Defendants.

FINDINGS AND ORDER

In this case the Court takes judicial notice that all defendants have relied upon the terms, provisions, and the various water rights declared and decreed by this Court in the *Orr Water Ditch Co. Decree*, Equity No. A-3, entered the 8th day of September, 1944. That such reliance has been either direct by reason of the ownership of certain of the decreed rights by defendants or indirect by reason of the dependence of the defendants on waters the right to the use of which has been decreed to others in the *Orr Ditch Case*.

The Court further finds and judicially notices as a fact that in the area of Northwest Nevada the water rights decreed in the *Orr Ditch Case* are in an arid and dry region and that all facets of life and economy in said area have been and are dependent upon the beneficial use

of the waters of the Truckee River and its tributaries. These areas of Northwest Nevada are typical of the many arid regions of other Western States or portions thereof.

The Court further finds and judicially notices that if the defendants were permitted to do so that they would severally and collectively produce before this Court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal, and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and that there has been a very steady population growth in said area since 1944.

No witnesses need or may be called by defendants to establish the precise details of such investment or of population or economic statistics or other factors set forth herein. However, any party may offer summaries as to the details of the matters covered herein.

DATED: April 2, 1976

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge